Supreme Court, U.S.
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No. 97-438

In The

Supreme Court of the United States

October Term, 1997

NELLIE HOWARD,

Petitioner,

v.

KATHY ANDERSON, KPMG PEAT MARWICK,
AND KPMG PEAT MARWICK LLP,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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1. Respondents are misleading the Court. Question 1 in the Petitioner's petition, filed September 2, 1997, ("Petition") presents only the issue whether the *Second Circuit* was correct in applying *any portion* of the Federal Arbitration Act ("FAA") in making its determination concerning Respondents' Motion for Dismissal for Lack of Jurisdiction. Contrary to Respondents' Brief in Opposition ("Brief"), Petitioner is *not* asking the Court to review the merits of the District Court case. Even a cursory reading of the Petition by Respondents would have revealed this.

The appealability rule for orders issued in respect of the FAA is unusual in that the rule has been placed in the FAA itself (in Section 16 of the FAA). Because the appealability rule for orders issued in respect of the FAA is in the FAA itself, the Second Circuit could not have granted Respondents' motion to dismiss Petitioner's appeal for lack of jurisdiction pursuant to the appealability rule in the FAA (which Respondents concede) without first assuming that the FAA applied to the arbitration agreement in her employment contract with Respondents. Thus, Petitioner may properly present to the Supreme Court the issue whether the FAA applies to the arbitration agreement in her employment contract with Respondents. Contrary to Respondents' assertions, Petitioner's arguments in the Petition concerning the applicability of the FAA to the arbitration agreement in Petitioner's employment contract concern issues relevant to the Petition and properly before the Court.

Section 1 of the FAA contains the following exception: "*nothing herein contained [that is, nothing in the FAA]* shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate

commerce." Emphasis added. Thus, Petitioner's arguments in Section 2C of the Petition, regarding whether Petitioner's employment contract falls within this exception, concern issues relevant to the Petition and properly before the Court.

Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20, 35 (1991), states that, where the Petitioner meets her burden, the applicability of the FAA to her claims is "precluded." Thus, Petitioner's arguments in Section 2A of the Petition, regarding whether she has met this burden, concern issues relevant to the Petition and properly before the Court.

Where the "knowing and voluntary" standard in the legislative history of Section 118 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1081, endorsed by the Ninth Circuit in *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied,* 116 S. Ct. 61 (1995), and *Renteria v. Prudential Insurance Co. of America*, 113 F.3d 1104 (9th Cir. 1997), is satisfied, Title VII (at 42 U.S.C. 2000e *et seq.)* trumps the FAA. Thus, Petitioner's arguments in Section 2B of the Petition, regarding whether her arbitration agreement was knowingly entered into, concern issues relevant to the Petition and properly before the Court.

Section 1 of the Petition discusses the extreme importance of the Supreme Court granting certiorari on the issue of the applicability of the FAA to arbitration agreements in employment contracts. This case points out that the issue of the applicability of the FAA to arbitration agreements in employment contracts is raised even in determining the appealability of a district court order that addresses the issue of the arbitrability of claims arising out of employment disputes. Considering the number of cases involving claims arising from employment disputes in which

employers have sought arbitration and the ease with which courts apply the appealability rule in the FAA to deny appeals from orders arising from these actions, it is easy to see that even this general issue of appealability has a tremendous effect on employees' rights.

2. Respondents have attempted to minimize the fact that the Second Circuit's definition of "final decision," and thus that the Second Circuit's characterization of an appealable order, under Section 16(a)(3) of the FAA is in conflict with Supreme Court precedent.

When a district court issues an order staying its proceedings pending the arbitration of *all* claims, the order is a final appealable decision within the meaning of *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521, 108 S. Ct. 1945, 1949 (1988), which defines a "final decision" as one that "leaves nothing for the court to do but execute the judgment." That an immediate appeal should be allowed from an order staying proceedings pending the arbitration of *all* claims is supported by the legislative history of Section 16(a)(3) of the FAA, which parrots the language in *Van Cauwenberghe*:

> [Section 16] preserve[s] the general policy that appeals should be available where there is nothing left to be done in the district court. . . . Under present doctrine, . . . the appealability of orders that . . . stay judicial proceedings depend on accidents of procedure that do not respond to any rational needs of either appeals timing or arbitration.

Committee on the Judiciary, Section by Section analysis on S1432 (in lieu of a Committee Report), 100th Cong., 2d Sess.

134 Cong. Rec. S16,284, S19,309 (1988) (emphasis added).

3. Contrary to Respondents' contention, the issue as to what constitutes a "final decision" under Section 16(a)(3) of the FAA is far from "settled."

Courts that had previously refused to treat *any* orders in "embedded" actions as "final," under Section 16(a)(3), have begun to allow for appeals in respect of orders that are issued in "embedded" actions and that are very similar to stays pending arbitration of *all* claims (as we have in this case). *Seventh Circuit: Compare Perrera v. Siegel Trading Co., Inc.,* 951 F.2d 780, 785 (7th Cir. 1991) (an order issued in an "embedded" action can never be a "final decision") *with Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993) (a "dismissal without prejudice" of an "embedded" action is a "final decision") *and S+L+H S.p.A. v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518 (7th Cir. 1993) (a district court order compelling arbitration of all claims is a "final decision" even though the *same* order also stayed proceedings, in a separately docketed "embedded" case *in the district court*, pending arbitration of these *same* claims).

CONCLUSION

For the reasons stated above and in the Petition, the Petition should be granted.

Respectfully submitted,

Nellie Howard
For Herself

October 15, 1997